SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 237.

W. L. WELLS COMPANY, Petitioner,

vs.

GASTONIA COTTON MANUFACTURING CO.

SYLLABUS TO BRIEF FOR PETITIONER AND REPLY TO SUPPLEMENTAL BRIEF FOR RESPONDENT.

(19,313.)

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SYLLABUS TO BRIEF OF PETITIONER AND ITS REPLY TO SUPPLEMENTAL BRIEF OF RESPONDENT.

JURISDICTION.

Plaintiff a corporation de jure.

(1.) The corporators of plaintiff applied in April, 1898, for a charter of incorporation under the laws of the State of Mississippi, which was duly approved by the governor of said State, and on the 18th day of July, 1898, formally accepted by said corporators, who thereupon opened books of subscription, when $10,000 capital stock was subscribed. On the same day the stockholders met and elected three directors; one W. L. Wells was president; another, George Butterworth, was vice-president, and the third, John T.

Wells, was secretary and treasurer. The said charter was duly recorded in the office of the secretary of state of the State of Mississippi, and also in the office of the clerk of the chancery court of Warren county, Mississippi, where the said plaintiff was domiciled.

In the early part of the cotton season of 1898 and 1899 the plaintiff and the defendant (a corporation organized and existing under the laws of the State of North Carolina) commenced doing business and continued to carry on said business *for a period* embracing two succeeding cotton seasons and the part of a third, and all said business was transacted by plaintiff in its corporate name. All the cotton was bought by defendant from the plaintiff as a corporation and in its corporate name. All payments therefor were made by the defendant to plaintiff as a corporation and in its corporate name, and all invoices were in the name of the plaintiff as a corporation, and in all the correspondence between plaintiff and defendant the corporate name was used.

At the end of the first season's business the plaintiff's net profit in its treasury, exclusive of all sums withdrawn by the stockholders and the $10,000 subscription of said corporators to its capital stock, amounted to over $22,000, and with the said original capital stock over $32,000, and the defendant owed nothing to plaintiff, having previously accounted with and paid plaintiff for all cotton purchased during that season.

At the end of the second season there was in the treasury of the plaintiff, realized from its net profits after deducting the amounts withdrawn by its said three stockholders and their $10,000 subscription to the capital stock, $27,000, and with the capital stock $37,000, and the defendant then owed plaintiff as a balance on 1,615 bales of cotton $6,998.13.

At the termination of the third season's business, wherein 794 bales of cotton were bought by defendant from plaintiff, the defendant owed plaintiff a balance of $35,397.99, exclusive of interest for the recovery of which this suit was instituted, and for which with interest ($39,313.88), a judgment

was rendered in favor of plaintiff against defendant by the circuit court of the United States for the western district of North Carolina on June 20, 1902.

Plaintiff was therefore a corporation *de jure*, and the said circuit court had jurisdiction to render said judgment.

Plaintiff was created a corporation by the terms of its charter, and its right to sue was thereby expressly authorized.

(2.) The charter of incorporation of plaintiff by words *in præsenti* created it a body corporate under the name of "W. L. WELLS COMPANY," with power "to sue and be sued," and upon the acceptance of and organization under said charter the plaintiff's right to sue cannot be denied, notwithstanding the charter provided that "as soon as $10,000 of "said stock is subscribed and paid for, said corporation shall "have power to commence business," and that at the time of said organization the $10,000 had only been subscribed, and not paid.

(2a.) Where the "charter of incorporation provides that the persons therein named be, and they are hereby, created a body politic and corporate under the name and style of" the proposed corporation it "was in itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter"—"and the corporation is in existence for all purposes of its creation from the beginning."

Perkins *vs.* Sanders *et al.*, 56 Miss., 733, 739, 740.

St. Joseph & Iowa Railroad *vs.* Shambaugh, 166 Mo., 567.

Hammond *vs.* Strauss, 53 Md., 1.

Plaintiff was at least a corporation de facto.

(3.) "The requisites to constitute a corporation *de facto* are three: (1) a charter or general law under which such a cor-

poration as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; (3) actual user of corporate franchises."

Tulare Irrigation District *vs.* Shepard, 185 U. S., 1 and 13.

See Brief, pages 19 to 39, both inclusive.

(3a.) It cannot be successfully denied that there was a general law under which plaintiff might lawfully be organized; second, that plaintiff attempted to organize thereunder, for it accepted said charter, had the same duly recorded, opened books of subscription when $10,000 was subscribed, $5,000 by W. L. Wells, $2,500 by John T. Wells, $2,500 by George Butterworth, and elected three directors; one of them, W. L. Wells, was president; another, George Butterworth, was vice-president, and a third, John T. Wells, was secretary and treasurer; and that the said plaintiff for at least three cotton seasons conducted a cotton business, buying and selling cotton and particularly selling large quantities of cotton to defendant, all in its corporate name, and actually using through these three seasons its corporate franchises.

The corporate existence of plaintiff cannot be assailed, even if the capital stock was not paid before the commencement of business.

(4.) "There may be a corporation *de facto*, the existence of which cannot be attacked collaterally,—though the capital stock, or a certain percentage thereof, was not subscribed, or paid, as required by the statute."

Clark & Marshall on Private Corporations, vol. 1, 257–259.

who cites—

Stokes *vs.* Findlay, 4 McCrary, 205.

Bibb *vs.* Hall, 101 Ala., 79.

Canfield *vs.* Gregory, 66 Conn., 917.

Union Water Co. *vs.* Kean, 52 N. J. Eq., 111.

to which may be added—

Merchants' & Manfrs.' Bank *vs.* Stone *et al.*, 38 Mich., 779.
Att'y Gen'l *vs.* Simonton, 78 N. C., 57.
Hackensack Water Co. *et al. vs.* Minna De Kay *et al.*, 36 N. J. Eq., 548.
Eaton *et al. vs.* Aspinwall, 19 N. Y., 121.
Rice *vs.* Rock Island & Alton R. R. Co., 21 Ill., 93.
Burns *et al. vs.* Beck *et al.* (Ga.), 10 S. E., 121.
McCandless *et al. vs.* Inland Co. (Ga.), 42 S. E., 449.
First Nat'l Bank of Salem *vs.* Almy *et al.*, 117 Mass., 476.
Fargason *vs.* Oxford Mercantile Co., 78 Miss., 65.
Oregonian R. R. Co., Ltd., *vs.* Oregon Ry. & Navigation Co., 23 Fed. Rep., 232.
Armour *vs.* E. Bement's Sons, 123 Fed. Rep., 56.
Andes *vs.* Ely, 158 U. S., 312.
Hammond *vs.* Strauss, 53 Md., 1.

(4*a*.) A failure to pay for the capital stock of a corporation cannot be made the basis of defense by a debtor of said corporation, and the question can only be raised by the State.

Smith *et al. vs.* Meridian & Ala. R. R. Co., 6 S. & M. 179.

(4*b*.) The failure to issue capital stock is immaterial.

Close *vs.* Glenwood Cemetery, 107 U. S., 385.

The defendant is estopped to assail the corporate existence of plaintiff.

(5.) Defendant having contracted with the plaintiff as a corporation, and being now in the enjoyment of the fruits of such contract, is estopped to deny its corporate existence.

Casey *vs.* Galli, 94 U. S., 673, 680.
Andes *vs.* Ely, 158 U. S., 312–322.
N. O. Debenture Co. *vs.* Louisiana, 180 U. S., 320, 328.
See Brief, pages 39 to 45, both inclusive.

The corporate existence of plaintiff cannot be attacked except by the State.

(6.) "Being a *de facto* corporation, the general rule is that none but the State can call its existence into question."

Tulare Irrigation District *vs.* Shepard, 185 U. S., 14.
Fargason *et al. vs.* Oxford Mercantile Co. *et al.*, 78 Miss., 65.

(6*a*.) "The courts are bound to regard it (a corporation irregularly organized and therefore a corporation *de facto*) as a corporation so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it."

Frost *vs.* Frostburg Coal Co., 24 How., 278.

(6*b*.) A bank organized under the laws of a territory "cannot legally exercise its powers until its charter is approved by Congress," * * * "but this defect in its constitution cannot be taken advantage of collaterally."

Smith *vs.* Sheely, 12 Wallace, 358, 361.

(6*c*.) "It cannot be shown in defense to a suit of a corporation that its charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or nonuser. Advantage can only be taken of such forfeiture by process on behalf of the State, instituted directly against the corporation, for the purpose of avoiding its charter."

Kayser *vs.* Bremen, 16 Mo., 88.

Cited in—

County of Macon *vs.* Shores, 97 U. S., 277.
See Brief, pages 33 to 39, both inclusive.

It is sufficient to show a de facto corporate existence to maintain suit.

(7.) "It is sufficient—to show a *de facto* corporate existence in order to sustain an action by or against an association as a corporation, on a note, bond or other contract."

Clark & Marshall on Corporations, vol. 1, page 231.

Citing cases in Georgia, Idaho, Illinois, Indiana, Kansas, Massachusetts, Missouri, Nebraska, New York, Vermont, West Virginia, and also—

Dallas Co. *vs.* Huidekoper, 154 U. S., 654.

Even where there is a condition precedent, the right to recover is maintained.

(8.) "The distinction is between an entire absence of authority in the organic law itself, and the failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions. In the one case there is a want of power to act; in the other only by abuse of power conferred."

Sherwood *vs.* Alvis, 83 Ala., 115.

Smith *vs.* Sheely, 12 Wallace, 358.

Corporate act not void unless so declared by statute.

(9.) Where the failure to comply with the restrictions imposed by the statute does not by its terms vitiate and declare void the corporate acts, it is simply an inhibition and no one but the State can object.

Whitney *vs.* Wyman, 101 U. S., 392.

The issue of certificates of stock is not essential to corporate existence.

(10.) "It is not essential to the existence of a corporation that certificates of stock be issued. Without a certificate, a stockholder has a complete power to transfer his stock, to receive dividends, and to vote; and he is individually liable as a stockholder."

Cook on Corporations, 5th ed., vol. 1, sec. 13.

What is meant by the term "bona fide."

(11.) The words "*bona fide*" when used with reference to an attempted corporate organization under a charter must

be regarded, *if at all*, as the antithesis of "bad faith," using the latter in the sense of moral turpitude or a premeditated design to deceive or defraud. A corporation may fail to comply with some of the provisions of the law relating to the formation of corporations, and yet act in good faith.

See Brief, pages 72 and 73.

The re-enactment of a statute which has received judicial interpretation is a legislative adoption of that interpretation.

(12.) The Judiciary Act of September 24, 1789, was amended in 1875 and in 1888, and these amendatory acts were passed long after the Federal courts had assumed jurisdiction of corporations *de facto*, and the subsequent substantial re-enactment of the former statute, without rejecting such interpretation by the courts, is a legislative adoption of that interpretation.

Dollar Savings Bank *vs.* U. S., 19 Wallace, 227.

(12*a*.) Under the judiciary acts now in force the circuit courts of the United States have original jurisdiction of all suits of a civil nature at common law or in equity, where the amount in dispute exceeds $2,000, exclusive of interest and costs, wherein there is a controversy between citizens of different States *concurrent with the courts of the several States;* and as the State Court of North Carolina had jurisdiction of this controversy, the Federal court was also vested with jurisdiction.

An estoppel supports jurisdiction.

(13.) "An estoppel is as conclusive to support the jurisdiction as to support the contract."

Blackburn *vs.* Selma, etc., R. R., 2 Flipp, 525.

Courts act with extreme caution in adjudicating forfeiture of corporate franchises.

(14.) "Courts act with extreme caution in proceedings which have for their object the forfeiture of corporate franchises."

Mr. Freeman in his note to State *vs.* Atchison *et al.* R. R., 8 Am. St. Rep., 181.

(14*a*.) "A substantial performance of conditions imposed upon a corporation is all that is required."

Ibid., page 182.

(14*b*.) "It is a further rule that to work a forfeiture of the franchises of a corporation, there must be a wilful abuse or improper neglect, or something more than accidental negligence, excessive power, or mistake in the mode of exercising an acknowledged power."

Ibid., page 183.

Citing—

Angell & Ames on Corporations.
Boone on Corporations.
Morawetz on Corporations.
Waterman on Corporations.
Field on Corporations.

The courts must construe the charter favorably for the corporation.

(15.) "The injunction of the legislature to the courts is to construe the charter favorably and liberally for the corporation, so as to carry out its purposes."

Harris, att'y gen'l, *vs.* Miss. Valley & Ship Island R. R. Co., 51 Miss., 602.

(15*a*.) "The acts of misuser or nonuser must be touching matters which are of the essence of the contract between the sovereign and the corporation, and these must be wilful and repeated."

Ibid.

(16.) " *The State may waive its right to forfeit a charter.*"
Cook on Corporations, vol. 2, sec. 636, 5th ed.

The judgment in quo warranto proceedings is within the discretion of the court.

(17.) "A judgment in an ordinary *quo warranto* proceeding may either be a forfeiture of all the corporate franchises, and of the charter, or may be the forfeiture only of the right to do the illegal acts, and that it is within the discretion of the court to say which judgment shall be rendered."

Cook on Corporations, 5th ed., vol. 2, sec. 633.

(18.) *The franchise of being a corporation belongs to the corporators, which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises.*

Julian *vs.* Central Trust Co., 193 U. S., 93.

THE MERITS.

(19 and 20.) This court has power under the act of March 13, 1891, to require any case pending in the Circuit Court of Appeals, regardless of the status of the case in that court, to be certified to it.

Forsythe *vs.* Hammond, 166 U. S., 506, 513.
See also United States *vs.* Jahn, 155 U. S., 107.
Panama R. R. Co. *vs.* McNair Shipping Co., 166 U. S., 280.

(21.) This case was decided both upon the question of jurisdiction and upon the merits by the circuit court in favor of petitioner. The Circuit Court of Appeals denied jurisdiction, but inferentially recognized the merit of petitioner's contention by permitting an amendment, and defendant admitted a large indebtedness to petitioner, and if

this court sustains the ruling of the circuit court in retaining jurisdiction the judgment of the latter as a whole should be affirmed.

(22.) The whole case practically depends upon the pivotal question "Has the plaintiff the right to sue the defendant?" for if it possesses that right it is elementary law that its funds cannot be diverted to the *payment of the individual debt of one of its stockholders without the knowledge and consent of the other stockholders*, and for that reason also the judgment of the circuit court should be affirmed.

(22a.) *Defendant confesses in its pleadings that it owes W. L. Wells Co., a firm or corporation, a large balance, and as it also owes in addition the amount unjustly retained, as found by the circuit court*, that finding should be sustained.

(23.) The sole defense on the merits as presented by the answer was that the cotton was purchased with the understanding that "a portion of the purchase-money might be invested" in the stock of another manufacturing plant, and that this understanding or agreement was ratified in two settlements between petitioner and defendant, one on August 31, 1900, and the other on December 3, 1900. The practical effect of this plea or answer was to impose upon the defendant the duty of proving that a part of the proceeds of the cotton purchased by it was to be invested for the account and use of plaintiff in that stock, and that two settlements were made between petitioner and defendant, recognizing and ratifying the agreement that such an investment was to be made.

The evidence, all of which was objected to by the petitioner, simply shows that W. S. Wells, a stockholder, without the knowledge and consent of petitioner, agreed that part of the proceeds of the cotton belonging to petitioner could be used by the defendant in the payment of his individual sub-

scription for said stock. Under the familiar rule relating to pleadings and evidence, this evidence was properly excluded and a peremptory instruction was warranted. Even if the petitioner had consented to this misappropriation and the alleged settlement established, which was not the case, the testimony would not have been admissible under the pleadings, for the plea was that the corporate funds were to be used in the purchase of stock for the corporate account, and the evidence showed, if it showed anything, that these funds were to be used in the payment of W. L. Wells' individual subscription for said stock.

(24.) The main contentions of petitioner appear on pages 95 and 96 of the brief, and are as follows:

(1.) That the vague, indefinite, and wholly unsatisfactory testimony of John F. Love, as to an equally vague and indefinite agreement on the part of W. L. Wells to apply a portion of the purchase-money of cotton in payment of stock of the Loray mills, is directly contradicted by the letters which were written after the alleged conversations and which constitute the only written agreement between the parties, and which are, therefore, the only binding agreement in reference thereto. Upon the strength of these letters and other evidence, we contend that no such agreement was ever entered into by W. L. Wells, even if he had authority to bind the petitioner by any such contract.

(2.) But it is apparent from all the evidence that W. L. Wells had no authority to bind the petitioner by any such contract. It is not contended that he had any such actual or express authority, and it is plain that he had no implied authority from the petitioner to accept anything but money in payment of cotton. No one could presume that he had any such authority, because it was not only extraordinary and out of the usual course of business, but was *ultra vires* of the petitioner.

(3.) Even if W. L. Wells made such an agreement, yet it is apparent that it was only made for his own individual benefit, and it could not be presumed that he was authorized to have the money of his principal applied in payment of his own individual stock subscription to the Loray mills.

(4.) There has been no ratification of any agreement made by W. L. Wells, because (*a*) there are no facts from which ratification could be inferred; (*b*) the Wells Company did not have knowledge necessary to constitute ratification; (*c*) the contract could only have been ratified by the party who had authority to make it; (*d*) bringing suit on the contract was not a ratification, because none of the cotton in controversy was sold under the terms of the contract set up by respondent, and, besides, it was impossible for the Wells Company to repudiate the contract and save itself harmless; (*e*) the contract was *ultra vires* of plaintiff corporation, and therefore incapable of ratification.

The propositions of law relating to the merits are as follows:

FIRST PROPOSITION.

(25.) Conceding that W. L. Wells made the contract, set out in the answer, agreeing that a part of the purchase-money for cotton sold by plaintiff to defendant should be "invested" in stock of the Loray mills, this was beyond the scope of his authority and did not bind the Wells Company.

See Brief, pages 149 to 152, both inclusive.

(25*a*.) "A party who seeks to charge the principal for the contract made by his agent, must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff."

Schutz *vs.* Jordan, 141 U. S., 213.

(25*b*.) "Mere authority to sell gives an agent no power to exchange the chattels for other property, or to take anything else than money in payment for them."

Meacham on Agency, section 352.

(25*c*.) "When an agent is authorized to sell property, he must sell for money, unless special instructions take it out of the general rule."

Brown *vs.* Smith, 67 N. C., 245.

SECOND PROPOSITION.

(26.) The alleged agreement as to applying money due for cotton in payment of stock of the Loray mills was clearly for the individual benefit of W. L. Wells, and the respondent, having been put on notice of that fact, was bound to know that W. L. Wells did not have authority to apply the funds of the Wells Company in payment of his individual subscription to stock of the Loray mills.

See Brief, pages 153 to 158, both inclusive.

(26*a*.) "No principle of the law of agency is better settled than that no person can act as the agent of another in making a contract for himself."

Chrystie *vs.* Foster, 61 Fed., 551.

(26*b*.) "The general rule is that one who receives from an officer of a corporation notes or securities of such corporation in payment of or as security for a personal debt of such officer, does so at his peril. *Prima facie* the act is unlawful, and unless actual authority shown, the person will be deemed to have taken them with notice of the rights of the corporation."

Wilson *vs.* Railroad Company, 120 N. Y., 145.

(26*c*.) "An act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers, and no one who has notice of its character may safely rely or recover upon it without proof that the agent

was expressly and specially authorized by his principal to do the act or to make the contract."

Park Hotel Co. *vs.* Bank, 86 Fed. Rep., 742, and cases therein cited.

(27.) In this case it is indisputable that John T. Wells, the secretary and treasurer of petitioner, and George Butterworth, the vice-president of petitioner, constituting, with W. L. Wells, the three stockholders of petitioner, knew nothing whatever of any alleged subscription of W. L. Wells, and never authorized or ratified said subscription.

THIRD PROPOSITION.

(28.) Ratification by the Wells Company will not be implied, because it has not been affirmatively shown that the Wells Company, after full knowledge of all the material facts, did some act which might be considered in law as ratification.

See Brief, pages 158 to 162, both inclusive.

(28*a*.) "There can be no ratification of an act without knowledge of the act having been done."

Baldwin *vs.* Burroughs, 47 N. Y., 211.

Owings *vs.* Hull, 9 Peter, 627.

FOURTH PROPOSITION.

(29.) It was necessary to show actual knowledge on the part of the Wells Company in order for any act on its part to amount to ratification, and it was not sufficient to show that the Wells Company or its officers, by the exercise of diligence, might have ascertained the facts.

See Brief, pages 163 to 167, both inclusive.

(29*a*.) "Any ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with full knowledge of all the material facts connected with the

transaction, to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him."

Meacham on Agency, sec. 129.

(29*b*.) "Generally speaking, it does not devolve upon the principal to make inquiries as to the facts. He has a right to presume that his agent has followed instructions, and has not exceeded authority."

Oxford Lake Line *vs.* Bank, 40 Fla., 359.

FIFTH PROPOSITION.

(30.) Any notice which W. L. Wells may have had of the transactions in question cannot be imputed to the Wells Company, because W. L. Wells was acting for himself in the matter in question.

See Brief, pages 167 to 168, both inclusive.

(30*a*.) "Where an agent acts for himself in his own interest, and against the interest of a principal, without the latter's consent, in a given negotiation or transaction, neither the notice nor the knowledge of the agent can be lawfully imputed to the principal."

Central Coal Co. *vs.* Good & Co., 120 Fed., 793.

SIXTH PROPOSITION.

(31.) The alleged agreement could only have been ratified by the board of directors of the Wells Company.

See Brief, pages 169 to 170, both inclusive.

(31*a*.) "A ratification can only be made when the party ratifying possesses the power to perform the act ratified."

Marsh *vs.* Fulton County, 10 Wallace, 676.

SEVENTH PROPOSITION.

(32.) The bringing of this suit to recover the purchase price of the cotton was not a ratification of the contract.

See Brief, pages 170 to 182, both inclusive.

(32a.) "It is undoubtedly a sound doctrine, established by numerous authorities, that to make a ratification effectual it must be of some act done or engagement made as agent for or on behalf of the person whom it is alleged to bind."

Shoninger *vs.* Peabody, 14 Am. St. Rep., 88 (Conn.).

(32b.) To paraphrase the language in Stewart *vs.* Woodard, 50 Vt., page 78—

"The defendant purchased the cotton sued for and attempted a mode of payment which it was bound to know was unauthorized. It has had the cotton and converted it to its own use, never having paid the plaintiff for it. The implied promise arising from taking the benefit of the delivery of the cotton is sufficient to warrant a recovery in this action."

(32c.) "What the principal does in pursuance of a bargain which he has authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract. And if, when he acquires knowledge, he cannot, in justice to himself, disavow the whole of his agent's contracts, he is entitled to stand upon what he authorized, and repudiate the rest; the purchaser, who dealt with a special agent, without noting the bounds of his power, must suffer rather than the innocent principal."

Cooley *vs.* Perrine, 12 Vroom, 222.

EIGHTH PROPOSITION.

(33.) Conceding that the Wells Company obtained benefits from the alleged agreement and retained these benefits after knowledge of the contract, this retention of benefits would not amount to a ratification under the circumstances of this case.

See Brief, pages 183 to 190, both inclusive.

(33a.) "The receipt of the proceeds of the sale in ignorance of any such undertaking (a warranty by the agent) is neither an assent to the breach of duty, nor an extension of the au-

thority of the agent." * * * "In the case before us it is claimed that the receipt by the testator of the proceeds of an authorized sale is to be deemed an adoption of a contract, made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well-settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys and others, clothed with limited powers, and occupying strictly fiduciary relations."

Smith *vs.* Tracy, 36 N. Y., 79.

(33*b*.) "To hold that the principal is bound by agreements between the special agent and the person with whom he contracts, not authorized by the agent's appointment, and of which he had no knowledge when he accepted the benefits of the contract, would be entirely subversive of the whole doctrine of special agency."

Roberts *vs.* Rumley, 58 Ia., 301.

NINTH PROPOSITION.

(34.) The undisputed evidence shows that there was no actual ratification by the Wells Company, and whatever inferences of ratification might have been drawn from the failure of the Wells Company to demand money were fully explained and rebutted by the direct, positive, and uncontradicted testimony of J. T. Wells, and in this state of the evidence it was the duty of the circuit judge to direct a verdict for plaintiff.

See Brief, pages 190 to 197, both inclusive.

(34*a*.) "Presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them, and still more must give place when in conflict with clear, distinct, and convincing proof."

Fresh *vs.* Gilson, 16 Peter, 327.

Hurley *vs.* Watson, 68 Mich., 532.

TENTH PROPOSITION.

(35.) The diversion of $50,000 of the funds of the W. L. Wells Company in payment of subscription to stock in the Loray mills was *ultra vires*, whether the stock was intended for the W. L. Wells Company or for W. L. Wells individually.

See Brief, pages 198 to 208, both inclusive.

(35*a*.) This is a Mississippi corporation, and its powers are to be considered in the light of the laws of that State, and in Woodbury *vs.* McClurg, 78 Miss., 831, the Supreme Court of Mississippi, construing the statute under which petitioner was organized, held—

"No corporation shall directly or indirectly purchase or own capital stock, or any part thereof, of any corporation."

(35*b*.) The contract was *ultra vires*, and was absolutely void and not capable of being ratified.

See Brief, pages 203 and 204, both inclusive.

(35*c*.) The contract being *ultra vires*, the petitioner, even though it claimed benefits under the contract, was not estopped to contest it.

See Brief, pages 205 to 206, both inclusive.

(35*d*.) The rule is not different because, as claimed by the plaintiff in error, this is an executed contract.

See Brief, pages 206 to 208, both inclusive.

(36.) Bringing suit on a contract made by an agent will not amount to a ratification of the unauthorized provisions of the contract, and particularly so when the principal had no knowledge of such provisions until it was impossible

for him to repudiate the entire contract without injury to himself.

See Martin vs. Hickman, 41 S. W., 852.

Peremptory instruction proper.

(37.) "Whenever the evidence is not legally sufficient to serve as the foundation of a verdict, the court should so instruct the jury." * * * "Where there is no evidence upon which a jury can properly proceed to find for the party producing it, conceding to evidence the greatest possible force to which it is fairly entitled, the court may withhold case from jury."

Rose's Digest, vol. 3, title Trial, page 2528.

REPLY TO SUPPLEMENTAL BRIEF FOR RESPONDENT.

The respondent now practically confesses error, so far as the jurisdiction of the circuit court is concerned, and seeks to avoid a final determination here of the entire case by citing—

American Sugar Refining Co. *vs.* City of New Orleans, 181 U. S., 277.

That case, as will be readily perceived, is not in point. There the *Circuit Court of Appeals* reached the conclusion that *it had no jurisdiction* to entertain the appeal, but the jurisdiction of the circuit court was admitted, and *two* defenses on the merits, one involving a grave constitutional question, were presented. Besides in that case "the petitioner prayed for a writ of certiorari, or for a writ of mandamus to command the judges of the Circuit Court of Appeals to hear, try and adjudge said case." Here the jurisdiction of the Circuit Court of Appeals was not involved, but the power of the circuit court was denied.

Inferentially we submit, the Circuit Court of Appeals in this case recognized the merit of plaintiff's contention by permitting an amendment, and thus authorizing the circuit court to deal with plaintiff as if it were a copartnership. A partner has no greater right to divert funds of a copartnership to his own use or to the payment of his individual debts than a stockholder has to use the property of the corporation for his personal benefit.

If the Circuit Court of Appeals had considered that the plaintiff had *absolutely no right* of recovery, the permission to continue the proceedings by authorizing the amendment would have been an expensive and useless formula.

Courts do not encourage delusive hopes in a litigant, and in this age of practical achievement it is the substance and not the cerement which invites judicial exposition; both the jurist and the legislator now seek to achieve results with expedition and with as little formality as possible; but whether our inference is maintainable or not, we contend that this case, which is in some respects unique and unprecedented, should be finally decided here upon the merits.

The principles involved are all elementary, and the plaintiff should no longer be delayed in the enforcement of the collection of the debt so justly, and a considerable portion thereof admitted to be, due it. The debt was contracted in 1900; there has been one trial in the circuit court, two hearings in the court of appeals, and defendant confesses it owes petitioner a large balance, but which it did not pay into court, and is therefore using for its own purposes, and there is no reason why a further hearing should be allowed in any other court if this court sustains the jurisdiction.

The testimony introduced by defendant did not even tend to establish its sole defense, and was properly excluded by the circuit court. It does not require argument to maintain—

First. That the president of a corporation, owning one-half of its capital stock, could not use the corporate fund without the knowledge or consent of the other two stockholders in payment of his individual subscription of $50,000 to the capital stock of another corporation.

Second. That a plea which charges that the cotton was purchased with the understanding that part of the funds was to be invested by the selling corporation in the stock of a third corporation cannot be the basis of recovery when the evidence shows that the corporate fund was to be applied solely and wholly, under an agreement with an agent of the selling corporation, to the discharge of the personal obligation of said agent.

Third. That a corporation or partnership possessing a capital of only $10,000 cannot be permitted, in violation of the laws of the State of its creation, to subscribe, directly or indirectly, $50,000 to the capital stock of another corporation.

Fourth. That the very statement that a corporation or partnership with $10,000 capital can have $50,000 of its assets diverted by a stockholder or copartner, without the knowledge or consent of the other stockholders or copartners, to the payment of that stockholder's or copartner's individual debt cannot be upheld in any court.

Besides, it is a maxim of law that it is to the interest of the Republic that litigation should cease which, although the basis of the doctrine of *res judicata* could be justly applied here, and no useful purpose can be accomplished by the further prolongation of this already protracted, needless, and costly litigation.

We further submit that the law does not require that the plaintiff should be punished because of the errors of procedure on the part of the defendant, and punishment, if any, should be imposed upon the offender and not upon the innocent. This case should have been brought here directly from the circuit court by the defendant had it suited its purpose. Having been brought here at the instance of the petitioner, after an adverse verdict in the Circuit Court of Appeals, under the general powers vested in this court, we submit that the right to final adjudication should be recognized.

This court has said in

United States *vs.* Jahn, 155 U. S., 109:

"The act (of 1891) was passed to facilitate the prompt disposition of cases in this court, and to relieve it from the oppressive burden of general litigation, but the right of review by appeal or writ of error and of invoking the supervisory jurisdiction of this tribunal, were sought to be amply secured, and should not be circumscribed by too narrow a construction."

A cursory examination of the record clearly shows that there is no principle of law contended for by the petitioner which can be successfully controverted by the defendant; that there are no facts which justify a reversal of the action of the circuit court on the facts; that defendant retains possession of the large sum it confesses belongs to petitioner, and we submit that the finding of that court, under all the circumstances in this case, should receive final approval here.

Respectfully submitted,

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